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In the

Supreme Court of the United States

October Term, 1935.

IN THE MATTER OF:

TENNESSEE PUBLISHING COMPANY, DEBTOR.

BRIEF OF RESPONDENTS IN OBJECTION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

May It Please the Court:

This brief in opposition to the petition for the writ of *certiorari* is filed on behalf of C. O. Carpenter, Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, American National Bank, Paul M. Davis, J. C. Bradford and O. H. Ingram, of Nashville, Tennessee, R. H. M. Robinson and C. T. Jaffray, Receivers of Minnesota & Ontario Paper Company, Minneapolis, Minnesota. These respondents own and hold seventy-three per cent of the outstanding bonds issued by Tennessee Publishing Company, and likewise constitute more than fifty per cent of the unsecured creditors. All of these respondents, by proper pleadings in the District Court, appeared in response to a show cause order and moved to dismiss the Debtor's petition for reasons which appear in the opinion of the Circuit Court of Appeals for the Sixth Circuit.

It is submitted that the petition for writ of *certiorari* should be denied in this case for the reasons hereinafter set out.

REASONS RELIED UPON FOR DENIAL OF THE WRIT.

1. A review on a writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The petition fails to set out any character of reasons generally considered by the Court in connection with petitions for *certiorari* as required by Rule 35 of this Court. Nor does the decision of the Circuit Court of Appeals for the Sixth Circuit in this case come within any of the suggested class of cases, because:

(a) The decision of the Circuit Court of Appeals for the Sixth Circuit in this cause is not in conflict with the decision of any other Circuit Court of Appeals on the same matter, and on the other hand is wholly *in accord* with all such decisions.

(b) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case is wholly tenable and is in accord with the weight of authority.

(c) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case does not involve any question of Federal law which has not been settled by this Court, nor is it in conflict with the applicable decisions of this Court. On the other hand, the decision is strictly in accord with the controlling decision of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

(d) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case is confined to its own peculiar facts, which are not likely to occur again.

(e) There is no error in law or fact in the decision of the Court of Appeals for the Sixth Circuit in the present case.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, rendered by Circuit Judge Simons, is reported in 81 F. (2d), at page 462. The Court affirmed the action of the District Judge in dismissing the Debtor's petition for reorganization under Section 77B of the Bankruptcy Act, upon the ground that the petition was not presented in good faith as required by law, and further because the fundamental basis of the proceeding was a violation of respondent's substantive rights in the specific properties in contravention of the Fifth Amendment to the Constitution of the United States, and in violaion of the principles of law announced by this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

The Circuit Court of Appeals for the Sixth Circuit made a painstaking investigation into the various plans of reorganization proposed by the Debtor, and commented thereon as follows:

> "We confess our inability to understand the Debtor's proposed reorganization plan in all of its phases, even after diligent study, effort to separate argument from concrete proposals, and an earnest attempt to reconcile apparently conflicting clauses."
> (R., p. 17b.)

With respect to certain phases of the plan of reorganization, the Court said:

> "We make no effort to state them, for they are wholly incomprehensible."
> (R., p. 18b.)

The Court held in substance that the purpose of Section 77B of the Bankruptcy Act was to relieve distressed debtor corporations and to provide the mechanics for reorganization *where reasonable expectation* of continued useful existence may be fairly entertained. The Court then said:

> *"This being so, something more must be demonstrated by the debtor than mere honesty or sincerity of purpose. If not, then the way is open to the exploitation of every involved corporation by visionaries whose illusory and optimistic imaginations outrun their business judgments, and the interest of every legitimate creditor is at the mercy of debtors whose sole hope of financial salvation is an abiding faith in miracles."* (Italics ours.)
>
> (R., p. 19b.)

Upon examining the various plans of reorganization proposed by the Debtor in the light of the foregoing principles, the Court concluded from the undisputed facts that the petition must be dismissed for the following reasons:

> "It appears from the record that the total assets of the debtor upon fair appraisal are worth less than $300,000. The bonded indebtedness exceeds $900,000, and the unsecured indebtedness is more than $300,000. To this must now be added the cost and expenses of the receivership. Moreover, the receiver has been operating at a loss, and the debtor concedes that it also will for a time operate at a loss; its most optimistic undertaking being, if the property is restored to it, to reduce current losses 25 per cent. When these figures are considered together with the vagueness of detail in the proposed plan, the doubt that exists as to whether under section 77B there may now be a reopening of the adjudication of the claims against the debtor in the equity proceeding, it seems clear to us that the proposed plan *is not a workable plan, offers no reasonable prospect for successful rehabilitation of the debtor, and is in consequence not, in the sense the phrase is*

used in the section, presented in good faith." (Italics ours.)

(R., p. 19b.)

With respect to the rights of the bondholders to a judicial public sale of the properties (it being admitted that they had a specific lien against the respective properties which existed long prior to the passage of Section 77B as an amendment to the Bankruptcy Act), the Court said:

"We confine ourselves to the provisions of subsection (b) (5), which outline a method for adjustment of claims of non-assenting creditors, and inquire as to their validity in the light of the due process clause. Upon this issue we view the decision of the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, controlling. Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the rig to have the mortgaged property devoted primarily t the satisfaction of the debt; and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford Case."

(R., p. 21b.)

The petitioner's several assignments of error challenge only the validity of the foregoing conclusions of the Court,

and dispute none of the facts upon which the conclusions were reached.

GOOD FAITH

I.

It is submitted that there is no error in the decision of the Court of Appeals for the Sixth Circuit in dismissing the proceeding for lack of statutory good faith.

The record shows without dispute that this was not a bona fide petition by an embarrassed debtor corporation within the purview of the applicable statute, but on the other hand it is a speculative venture by an individual who acquired the worthless common stock of a corporation "notoriously insolvent," for an undisclosed consideration, two years after the general creditors bill had been sustained and on the day before the final step of liquidation under an equity receivership was to have been taken, to-wit, a sale of all the properties at public auction. The sole purpose of this individual speculator is financial gain, and the proceeding has no object other than this result. The Court of Appeals found as a fact:

> "A final hearing was set for June 6, 1935, and it was then the reasonable expectation of all parties in interest that a sale of assets would be ordered and the receivership terminated.
>
> "On June 5, 1935, Carmack, son of a former editor of the debtor's papers, acquired from the Leas, then its owners, all of the debtor's common stock. He immediately had himself elected president, and instituted the debtor proceedings here involved under section 77B."
>
> (R., p. 14b.)

Carmack himself filed an "Explanatory Petition," from which it appears that the whole proceeding is his personal enterprise for the purpose of having himself elected editor

of the paper and to otherwise make a personal profit out of the common stock acquired the day before the properties were to be sold. It is apparent from the explanatory petition (section 1) that after filing the petition in the name of the corporate debtor Carmack had sold and disposed of a substantial interest in the common stock contingent upon the Court's sustaining the proceeding. (R., pp. 79-83.)

The filing of the petition in the name of the corporate debtor was purely a legal fiction and the Court will not recognize the legal entity where it is used as a blind for personal purposes.

McCaskell Co. v. U. S., 216 U. S. 504, 30 S. Ct. 286, 54 L. Ed. 590.

Pierce v. *National Bank of Commerce*, 13 F. (2d) 47, 48.

Majestic Co. v. *Orpheum Circuit*, 21 F. (2d) 720.

In the recent case of *In re Cosgrave*, 10 F. Supp. 672, involving a strikingly similar situation, the District Judge stated the case as follows:

> "The question here is: Can an individual suddenly acquire an equity in property for a nominal amount, and proceed immediately under section 74 of the Bankruptcy Act?"

District Judge James answered in the negative, and dismissed the proceeding upon the following grounds:

> "The facts and circumstances connected with the acquiring of the equity as shown here, demonstrate that the sole purpose of the dealings made by the petitioner was to enable her to prosecute a proceeding under Section 74, in order that the foreclosure of the trust deed encumbrances should be prevented."
>
> *In re Cosgrave*, 10 F. Supp. at p. 673.

This principle was applied to a petition under Section 77B of the Bankruptcy Act by the District Judge in *In re*

Philadelphia Rapid Transit Co., 8 F. Supp., 51, where three creditors bought their way into court and had their petition dismissed upon the following statement by the District Judge:

> "The real purpose and motive behind the position existed before they became creditors and they became creditors solely as an aid in the accomplishment of this purpose. This was frankly admitted in the argument. They bought their way in as creditors and presumedly can sell their way out.
>
> "The petition is not in truth a real creditors' petition and in this sense is not in good faith. Approval should in consequence be denied."
>
> *In re Philadelphia Rapid Transit Co.*, 8 F. Supp., at pp. 54-55.

II.

Wholly aside from petitioner's position having been deliberately purchased for speculative purposes, it is clear that the Circuit Court of Appeals for the Sixth Circuit reached the proper conclusion in holding that the proposed plans were not workable, offered no reasonable prospect for rehabilitation of the Debtor and, therefore, the proceeding was not in good faith in the sense of the phrase as used in Section 77B of the Bankruptcy Act.

It is error to say that the District Judge approved any of the plans as feasible or workable. On this dispute it is sufficient to quote the following language of the District Judge:

> "I think the draftsman of the amended plan misconstrued the language of the Court. I admit the conclusions of the Court were poorly stated, but I do not think what was said would justify the conclusion that the plan appeared to the Court to be workable and feasible, and that, but for the constitutional question, I would approve it."
>
> (R., p. 122.)

After a full consideration of the undisputed facts, the Court of Appeals dismissed the petition because it afforded no reasonable prospect for successful rehabilitation of the Debtor. Its findings are clear and concise and its conclusions admit of no reasonable dispute. (R., p. —.) There appears to be no dispute in the decisions of any of the Federal courts as to the propriety of such action.

In re 235 West 46th Street, Inc., 74 F. (2d), 700.
In re Williamsport Wire Rope Co., 10 F., Supp., 481.
Manati Sugar Co. v. *Mock*, 75 F. (2d), 284.

The applicable rule of law is well stated in the case last above cited, in the following language:

> "To conclude that a petition is filed in good faith, there should be a showing, found within it, of a need for a reorganization. The good-faith provision of the statute is not satisfied merely by honesty and good intentions. There must be a showing that the petitioners have a basis for expecting that a reorganization can be effected. Where the object is reorganization, rather than liquidation, the petitioner should furnish some assurance, by allegations at least, that they reasonably expect a fairly general support for their proposed plan or promised plan. Otherwise there would be little to be expected in the undertaking of assuming responsibility for a reorganization.
>
> . . . . .
>
> "But it must appear that there is reasonable probability that a reorganization will be effected. In other words, the question presented is whether there may be reasonably applied to the debtor some feasible and practicable plan of reorganization. If not, there is no occasion to invoke the benefits of the act."
>
> *Manati Sugar Co.* v. *Mock*, 75 F. (2d), at p. 285.

CONSTITUTIONAL QUESTION.

The holding of the Circuit Court of Appeals for the Sixth Circuit with respect to the constitutional question involved

was merely an application of the express decision of this Court in the recent case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

It is conceded that prior to the passage of Section 77B as an amendment to the Bankruptcy Act all of the respondent bondholders had acquired under a registered indenture, and had actually asserted in court the following substantive rights in the specific properties owned by the Debtor:

> (1) The right to retain the lien until the indebtedness thereby secured is paid.
>
> (2) The right to realize upon the security by a judicial public sale, or by sale by the Trustees, as provided in said indenture.
>
> (3) The right to determine when such sales shall be held, subject only to the discretion of the court and to the terms and conditions of said indenture.
>
> (4) The right to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of proceeds of a fair competitive sale, or by taking the property itself.
>
> (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.
>
> (R., p. 55.)

It is likewise admitted that all of the Debtor's plans of reorganization, propose to take these rights from the bondholders without their consent. With respect to the last plan the District Judge said:

> "It appears to me that the effect of the last plan is to disregard what has been done in the equity receivership case, and to delay a final administration of the

debtor's estate indefinitely. None of the bondholders are willing to adopt the plan; more than two-thirds of the bondholders have by pleadings, affirmatively rejected it, and more than 50 per cent of the unsecured creditors have affirmatively declined to accept the plan. If I should adopt it, or, if I should overrule the motion to dismiss the petition, it would amount to cramming down the throats of these secured creditors, a plan which they almost unanimously reject. I would be taking from them a substantive right that they have in the property, and the very best that could be said of it—the best excuse that the Court could offer—would be that it would postpone their right to a public sale of the property to such time as the Court might see fit to sell it. That is the most liberal construction in favor of the plan."

(R., pp. 122-123.)

Upon analyzing the plan of reorganization (so far as could be done), the Court of Appeals for the Sixth Circuit reached the same conclusion, and said:

"Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the right to have the mortgaged property devoted primarily to the satisfaction of the debt; and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford Case."

(R., p. 21b.)

It is to be noted that the respondent bondholders do not contend that Section 77B in all of its provisions is unconstitutional, nor do they contend that the Act is not a law upon the general subject of bankruptcy. The violation of the bondholders' constitutional rights arises out of the effort of the debtor corporation to force the bondholders to relinquish their specific rights in the substantive properties in violation of the Radford decision, without their consent and indeed without even giving them a right to vote upon the proposition. It should be borne in mind that no bondholder has consented to the plan, seventy-three per cent of the bondholders have affirmatively disapproved and rejected the plan by formal appearance in court, and more than fifty per cent of the unsecured creditors likewise formally rejected the plan.

CONCLUSION.

The assignments of error filed by petitioner do not question the finding of facts as made by the Circuit Court of Appeals for the Sixth Circuit. For that reason we have not undertaken to discuss the apparent disagreement in the petitioner's statement of facts and those contained in the opinion of the Circuit Court of Appeals, since the latter are controlling in this proceeding. It is respectfully submitted that the petition fails to present any compelling reason why this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit in the light of the standards laid down in Rule 35, subsection (5) (b), in the rules of this Court with respect to the writ of *certiorari*. There is no dispute in any of the reported cases with respect to the controlling principles of law relating to either the question of good faith or the constitutional questions involved. It is quite apparent that the petitioner disagrees with the principles announced by this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106, but such disagreement is not a sufficient ground for a review nor

is it the duty of this Court to hear a case on *certiorari* merely to apply the well established principles of law.

We deem it proper to call the attention of the Court to the fact that in the equity proceedings referred to in the record, the District Court has ordered all of the assets of the insolvent corporation sold at public auction on June 1, 1936. The filing of the petition for *certiorari* has been delayed until only a short time intervenes before the date of sale. *It is important that the petition for certiorari be acted upon, if the business and convenience of the Court so permit, prior to June 1, 1936, the date set for the sale. These facts are called to the attention of the Court with the consent of adversary counsel.*

Respectfully submitted,

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